NO. 4-10-0362 Order Filed 4/5/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

COMMUNITY LIVING OPTIONS, INC., d/b/a Bellefontaine Place, Plaintiff-Appellant, v. THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH; WILLIAM BELL, Acting Deputy Director of the Illinois Department of Public Health; and DR. DAMON T. ARNOLD, Director of the Illinois Department of Public Health, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 09MR498 Honorable Patrick J. Londrigan, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

Held: Because the Illinois Department of Public Health's request to amend notice of violations did not redetermine the violations alleged or reassess the penalties imposed in its initial notice, the Department's amendment was valid.

In October 2007, defendants, the Illinois Department of Public Health, William Bell, and Dr. Damon T. Arnold (collectively, Department), concluded an investigation concerning, in part, the sexual assault of a resident who was under the care of plaintiff, Community Living Options, Inc., d/b/a Bellefontaine Place (Bellefontaine), an intermediate-care facility for the developmentally disabled.

In December 2007, the Department sent Bellefontaine a "notice of Type A violation(s); and order to abate or eliminate;

notice of conditional license; notice of fine assessment; notice of placement on quarterly list of violators; [and] notice of opportunity for a hearing" (collectively, the notice). The Department's notice (1) concluded that Bellefontaine committed 12 violations of the Intermediate Care for the Developmentally Disabled Facilities Code (77 Ill. Adm. Code 350.110 through 350.4210, amended at 31 Ill. Reg. 8850 (eff. June 6, 2007)); (2) "determined that such violations constitute[d] one or more Type A violations," as defined by section 1-129 of the Nursing Home Care Act (210 ILCS 45/1-129 (West 2006)); and (3) assessed a $20,000 fine pursuant to section 3-305(1) of the Act (210 ILCS 45/3-305(1) (West 2006)).

In January 2008, Bellefontaine sent a timely request for hearing, contesting the Department's determination pursuant to section 3-703 of the Act (210 ILCS 45/3-703 (West 2006)). In March 2009, an administrative law judge (ALJ) granted the Department's motion to amend notice, which (1) eliminated 9 of the 12 Code violations and (2) under the penalty notice, (a) classified the 3 remaining violations as separate Type A violations and (b) assessed separate fines for each violation that totaled $20,000. Following a hearing on Bellefontaine's request for hearing conducted immediately thereafter, the ALJ recommended that the Department issue an order (1) concluding that Bellefontaine committed three Type A violations and (2) assessing fines, which

totaled $20,000. In June 2009, the Department issued a final order, adopting the ALJ's recommendations.

In July 2009, Bellefontaine filed a complaint for administrative review, requesting reversal of the Department's decision and attorney fees. Following an April 2010 hearing, the circuit court affirmed the Department's decision.

Bellefontaine appeals, arguing that the Department's amended notice is void because the Department lacked the legal authority to "redetermine" its initial notice. Alternatively, Bellefontaine argues that if this court concludes the Department's amendment was void, (1) section 3-305(1) of the Act prohibits fines greater than $10,000 for a single Type A violation and (2) it is entitled to attorney fees. Because we conclude that the Department's request to amend the notice was valid, we affirm.

I. BACKGROUND

A. The Circumstances Surrounding the Department's Notice

Because the parties do not contest the facts upon which the Department based its notice, we provide only a brief summary.

On September 17, 2007, a Bellefontaine employee told a Department investigator--who was at Bellefontaine investigating an unrelated complaint--about an incident involving two residents, "R1" and "R2," that occurred two days earlier. Based on this report, the investigator initiated a complaint and began a

second investigation. (The investigator also investigated a third complaint involving R1 individually; however, this appeal concerns only the incident between R1 and R2.) The subsequent investigation revealed the following.

In February 2007, R1 was transferred to Bellefontaine. R1 was a 19-year-old male who was 5 feet, 10 inches tall and weighed 175 pounds with an intelligence quotient (IQ) of about 60 and the cognitive skills of a 7-year-old. R1 had been diagnosed with moderate mental retardation, autism, bipolar disorder, aggressive behavior, and oppositional defiant disorder. The staff described R1 as a "highly sexually oriented" resident who had "major" sexual problems. Adverse incident reports showed that from March 2007 through August 2007, R1 (1) groped staff personnel, (2) grabbed the crotch of a female resident, (3) thrust his pelvis into the backside of a staff member, (4) ejaculated on his roommates' teddy bear, and (5) attempted to unhook a staff member's bra.

R2, a 19-year resident of Bellefontaine, was a 52-year-old female who suffered from moderate mental retardation, had an IQ of 40, and the cognitive skills of a 6-year-old. Bellefontaine staff described R2 as "childlike," easily led, and nice. Bellefontaine had an unwritten rule to keep R1 and R2 separated at all times because R1 "paid special attention" to R2.

On the morning of September 15, 2007, R2 informed a

staff member that R1 had lain "naked on her belly." The staff member noticed that R2 had bruising on both wrists. When the staff member asked R2 if she was hurt, R2 nodded affirmatively and pointed to her vagina. The staff member called the acting administrator and informed her of R2's claim.

An investigation conducted that same morning by the acting administrator, which consisted of (1) separate interviews of R1 and R2 and (2) a "body check" by Bellefontaine's registered nurse, revealed the following.

R2 stated that R1 (1) walked her to his room, where they took off their clothes; (2) "put his penis inside of [her]"; and (3) licked her stomach and "private parts." The administrator explained that R1 was diagnosed with microgenitalia, so R2 may have meant that R1's penis was in the area of her vagina. R1 stated that (1) he took R2 into his room, where he took off his clothes; (2) R2 complied with his request to remove her pants; and (3) he then began "humping" R2. The "body check" revealed (1) a yellow and brown discharge in R2's underwear, (2) a "quarter-size" redness on R2's right labial area, and (3) bruising on R2's arms and wrists.

Based on this information, the acting administrator concluded--three hours after her inquiry began--that the sexual contact between R1 and R2 was consensual. Because the administrator did not believe that R1 had sexually assaulted or raped

R2, she neither (1) informed the police or Department nor (2) transported R2 to the emergency room as Bellefontaine policy required.

B. The Department's Amended Notice

On December 6, 2007, the Department sent Bellefontaine a notice concerning the results of its three complaint investigations, which it completed on October 31, 2007. That notice (1) concluded that based on its investigations, Bellefontaine had committed 12 violations of the Code; (2) "determined that such violations constitute one or more Type A violations" as defined by section 1-129 of the Act; and (3) assessed a $20,000 fine pursuant to section 3-305(1) of the Act.

In January 2008, Bellefontaine sent a timely request for hearing, contesting the Department's determination. In October 2008, the circuit court granted Bellefontaine's motion for a continuance and rescheduled the hearing for March 24, 2009.

On March 16, 2009, the Department requested to amend its notice, as follows:

> "1. [Bellefontaine] timely requested a hearing on a Notice of Type 'A' Violation(s) and fine assessment of $20,000 that [was] issued on or about December 6, 2007.
>
> 2. On or about February 13, 200[9], an Order was issued in Sangamon County that

could be read to preclude [the Department] from seeking or enforcing fines for a single Type A violation in excess of $10,000.

3. Although [the Department] does not agree said Order is final, nor does [the Department] necessarily agree with the Order's language or content, [the Department prefers] to err on the side of caution."

Specifically, the Department's amendment sought, in pertinent part, to (1) eliminate 9 of the 12 Code violations and (2) under the penalty notice, (a) classify the three remaining violations as separate Type A violations and (b) assess separate fines for each that totaled $20,000.

Immediately prior to the start of the March 2009 hearing on the Department's original notice, the ALJ first considered the Department's motion to amend, which prompted the following argument:

"[BELLEFONTAINE:] And clearly, Judge, what is happening here is a transformation from a single Type A violation to three Type A violations. That's the only way the Department can get around the [court's] injunction.

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[ALJ:] Thank You[.]

[DEPARTMENT:] ***

Furthermore, [Bellefontaine] wants to call [our amendment] a redetermination. [The Department] is not redetermining anything. What [the Department] is doing is amending. At no point did we indicate there's only one Type A violation, not in the notice and not ever. In fact, the notice indicates 'Notice of Type A violations'. There's an 'S' there in parenthetical. There wouldn't be an 'S' there if it was only one."

Thereafter, the ALJ granted the Department's motion to amend its notice. The ALJ then conducted a hearing on the Department's amended notice, where the aforementioned evidence was presented.

In June 2009, the ALJ issued her report, recommending that the Department affirm her determination that Bellefontaine committed the following Type A violations and the associated penalties assessed: (1) a $5,000 fine for failing to follow residential care policies (77 Ill. Adm. Code 350.620(a), amended at 13 Ill. Reg. 6040 (eff. Apr. 17, 1989)); (2) a $5,000 fine for failing to immediately contact local law enforcement in cases of sexual abuse of a resident (77 Ill. Adm. Code 350.750(b)(3), added at 26 Ill. Reg. 4878 (eff. Apr. 1, 2002)); and (3) a

$10,000 fine for failing to ensure a resident is not abused or neglected (77 Ill. Adm. Code 350.3240(a), amended at 15 Ill. Reg. 466 (eff. Jan. 1, 1991)).

Later that same month, the Acting Deputy Director issued a final order, adopting the ALJ's recommendations.

In July 2009, Bellefontaine filed a complaint for administrative review, requesting reversal of the Department's decision and attorney fees. Following an April 2010 hearing, the circuit court affirmed the Commission's decision.

This appeal followed.

II. ANALYSIS

Bellefontaine argues first that the Department's amended notice was void because the Department lacked the legal authority to "redetermine" its initial notice. Specifically, Bellefontaine contends that (1) the Department's amended notice was barred by section 3-212(c) of the Act (210 ILCS 45/3-212(c) (West 2006)), (2) the Department's amended notice was void because it was not issued by the Department Director or his designee as required by the Act, and (3) the Department did not have the authority to amend its notice. We address Bellefontaine's contentions in turn.

A. The Definition of a "Type A" Violation, the Applicable Fine, and the Standard of Review

Section 1-129 of the Act provides the following defini-

tion of a Type A violation:

> "A 'Type "A" violation' means a violation of this Act or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a facility presenting a substantial probability that death or serious mental or physical harm to a resident will result therefrom." 210 ILCS 45/1-129 (West 2006).

Section 3-305(1) of the Act, pertaining to penalties or fines, provides the following:

> "Unless a greater penalty or fine is allowed under subsection (3), a licensee who commits a Type 'A' violation as defined in Section 1-129 is automatically issued a conditional license for a period of 6 months to coincide with an acceptable plan of correction and assessed a fine computed at a rate of $5.00 per resident in the facility plus 20 cents per resident for each day of the violation, commencing on the date a notice of violation is served *** and ending on the date the violation is corrected, or a fine of not less than $5,000, or when death, serious

mental or physical harm, permanent disability, or disfigurement results, a fine of not less than $10,000, whichever is greater."

210 ILCS 45/3-305(1) (West 2006).

"If the issue necessitates the interpretation of a statute, regulation, or rule connected with the administrative agency involved in the case, the question is one of law, the standard of review for the reviewing court is *de novo*, and the agency's interpretation is considered relevant but not binding on the reviewing court." (Internal quotation marks omitted.) *City of St. Charles v. Illinois Labor Relations Board*, 395 Ill. App. 3d 507, 509, 916 N.E.2d 881, 883 (2009) (quoting *Biekert v. Maram*, 388 Ill. App. 3d 1114, 1118, 905 N.E.2d 357, 362 (2009)).

B. Bellefontaine's Overarching Redetermination Claim

We note that in reviewing Bellefontaine's aforementioned contentions, the prevailing theme in each is that the Department's amendment to its December 2007 notice impermissibly *redetermined* the number of violations alleged and the penalties imposed. In particular, Bellefontaine contends that the Department's amendment attempted to change the December 2007 notice from a single Type A violation for which a $20,000 fine was assessed and redetermine amend it to reflect three Type A violations with three separate fines to evade the circuit court's controlling judgment in another case. We first address the

merits of Bellefontaine's overarching redetermination argument.

As previously noted, in March 2009, the Department sought to amend its December 2007 notice as a direct result of the circuit court's February 2009 order in another case (Sangamon County case No. 08-MR-257), in which the court found that (1) the Department was not statutorily authorized to impose a $20,000 fine for a single Type A violation and (2) remanding to the Department so that it could impose an appropriate fine not greater than $10,000. Although the Department believed that the court erred by making such a determination, it chose to "err on the side of caution" by requesting an amendment to the notice in this case to comply with the court's ruling. See *Rosewood Care Center, Inc. v. Illinois Department of Public Health*, Nos. 4-09-0463, 4-09-0515 cons. (2010) (unpublished order under Supreme Court Rule 23) (in which this court vacated the Department's notice and, by extension, the circuit court's judgment in Sangamon County case No. 08-MR-257, because the Department's notice of violation to the licensee was not timely).

In this case, the Department's timely December 2007 notice stated that the Department (1) concluded, based on its investigation of three separate complaints, that Bellefontaine had committed 12 violations of the Code; (2) "determined that such violations constitute one or more Type A violations of the Act"; and (3) assessed a $20,000 fine pursuant to section 3-

305(1) of the Act that was not specifically tied to any of the 12 violations. Thus, contrary to Bellefontaine's claim, the plain language of the Department's December 2007 notice did not specifically allege a "single" Type A violation that was assessed a $20,000 fine.

More important, the Department's amendment did not "redetermine" its December 2007 notice in that the Department's amendment request (1) did not (a) add new violations, which would have been prohibited under the time limits imposed by section 3-702(d) of the Act or (b) impose a higher fine than originally assessed; and (2) accurately characterized the three remaining Code violations as Type A violations as defined by section 1-129 of the Act.

Finally, Bellefontaine's claim that the Department's amendment sought to "evade" the circuit court's judgment in *Rosewood* is not supported by the record. Here, the records shows that the Department's argument (1) at the March 2009 hearing on its request to amend notice, (2) at the April 2010 hearing on Bellefontaine's complaint for administrative review, and (3) before this court is that the Department sought the amendment--in an abundance of caution--to comply with the court's determination in *Rosewood*, which was an appropriate action under the Administrative Code. See 77 Ill. Adm. Code 100.7(e) ("Amendments to the Allegations of Noncompliance and Answers may be allowed upon

proper motion at any time during the pendency of the proceedings on such terms as shall be just and reasonable"); see also 77 Ill. Adm. Code 100.8(a) ("Except as otherwise provided in this Part or by a specific statute, motions may seek any relief or order recognized in the Code of Civil Procedure and Rules of the Illinois Supreme Court").

Accordingly, we reject Bellefontaine's argument that the Department's amendment to its December 2007 notice impermissibly redetermined the number of violations alleged and the penalties imposed.

C. Bellefontaine's Timeliness Claim

Bellefontaine next contends that the Department's amended notice was barred by section 3-212(c) of the Act. Specifically, Bellefontaine asserts that the Department was prohibited from amending its December 2007 notice because the Department sought the amendment 502 days after its investigation had concluded. We disagree.

Section 3-212(c) of the Act, entitled "Inspections", provides, in pertinent part, that, "[v]iolations shall be determined under this subsection no later than 60 days after completion of each inspection, survey and evaluation." 210 ILCS 45/3-212(c) (West 2006).

We first note that although Bellefontaine relies on section 3-212(c) of the Act, we agree with the Department that

because the notice originated from determinations made after three complaint investigations were conducted, the more restrictive time frame imposed by section 3-702(d) of the Act, pertaining to complaints and investigations, controls. In this regard, section 3-702(d) requires that the Department determine, within 30 working days, whether a valid complaint constitutes a violation. See 210 ILCS 45/3-702(d) (West 2006) ("For any complaint classified as 'a valid report', the Department must determine within 30 working days if any rule or provision of this Act has been or is being violated"). However, regardless of the applicable statute, Bellefontaine's contention fails.

In this case, our review of the plain language of sections 3-212(c) and 3-702(d) of the Act reveals that neither statute imposes any restrictions on the Department's ability to amend its notice as contemplated in this case. Instead, sections 3-212(c) and 3-702(d) of the Act mandate that the Department determine whether a violation occurred within (1) 60 days after an inspection or (2) 30 working days after a complaint investigation, respectively, has been completed. In this regard, Bellefontaine concedes that the Department's December 2007 notice complied with section 3-212(c) of the Act and the record shows that the notice was timely under section 3-702(d) of the Act.

Bellfontaine claims that the Department could have amended its notice prior to the expiration of the statutory

deadline. Although such an amendment is theoretically possible, albeit improbable given the applicable 30-day limitation imposed by section 3-702(d) of the Act, Bellefontaine's argument ignores that the primary reason the Department sought the amendment was to comply with the circuit court's order in *Rosewood*, which was entered 14 months after its December 2007 notice. In addition, this court will not infer what the plain language of the statutes at issue here does not prohibit. Therefore, we reject Bellefontaine's contention that section 3-212(c) of the Act--or that section 3-702(d) of the Act--prohibits the Department from requesting and receiving an amendment to its notice under the specific procedural posture of this case.

D. Bellefontaine's Remaining Contentions

Bellefontaine also contends that (1) the Department's amended notice is void because it was not issued by the Department Director or his designee as required by the Act and (2) the Department did not have the authority to amend its notice. In particular, with regard to its endorsement contention, Bellefontaine asserts that the Department's counsel, who endorsed the request to amend notice, did not have the authority under the Act to redetermine violations or fine assessments, which is confined to the discretion of the Department Director or his designee. Similarly, with regard to its contention that the Department lacked the authority to amend its notice, Bellefontaine asserts

that the Department was not authorized to redetermine the notice by splitting a single Type A violation into three separate Type A violations.

However, because both of the aforementioned contentions are based on (1) the erroneous assumption that the Department's notice alleged a single Type A violation with an associated $20,000 fine and (2) a redetermination argument that we have already rejected, we need not address further Bellefontaine's remaining contentions.

Accordingly, we conclude that the Department's request to amend notice was valid. In so concluding, we decline to address Bellefontaine's alternative arguments, which were based on the assumption that the Department's amendment was void.

III. CONCLUSION

For the reasons stated, we affirm the Department's judgment.

Affirmed.